



# The Florida House of Representatives

*Interim Project Report*

December 16, 2005

---

Committee on Ethics & Elections

Representative Ron Reagan, Chair

---

## Report on the Florida Elections Commission

### MAKE-UP OF THE FLORIDA ELECTIONS COMMISSION

The Florida Elections Commission (FEC or Commission) is made up of nine members appointed by the Governor from a list provided by the Senate President, the Speaker of the House, the minority leader of the Senate and the minority leader of the House. The chairman is appointed by the Governor and runs concurrently with his term. No commissioner may serve more than two consecutive terms of four years.

The current members of the commission are:

**Chance Irvine, Chair**

Orange Park - Retired

*Term Expires: January 1, 2007*

**David J. Spencer**

Trinity - VP Marketing, AIG Private Client Group

*Term Expires: December 31, 2007*

**Jorge L. Cruz-Bustillo**

Miami - Attorney, David L. Swimmer, P.A.

*Term Expires: December 31, 2008*

**Claudia Medina Thomas**

Tampa - Attorney, Claudia Medina Thomas, P.A.

*Term Expires: December 31, 2007*

**Demetria L. Merritt-Bell**

Tampa - Instructional Specialist, USF

*Term Expires: December 31, 2007*

**Gregory King**

Winter Haven - Vice President of State Farm Insurance Companies

*Term Expires: December 31, 2008*

**Otis A. Mason**

St. Augustine - Retired Educator

*Term Expires: December 31, 2007*

**Beleria F. Floyd**

Tampa - Consultant with Verity Marketing

*Term Expires: December 31, 2008*

**Alberta J. Simmons**

Tallahassee - Consultant with Sharpton Brunson CPA

*Term Expires: December 31, 2008*

### JURISDICTION

Jurisdiction is vested in the FEC to investigate and determine violations of chapters 104 and 106, F.S., appeals of fines by members of county canvassing boards pursuant to section 102.112, F.S., and allegations of unlawful political activity of judicial candidates pursuant to section 105.071, F.S. The FEC's jurisdiction is further clarified in the Florida

Administrative Code, under Rules 2B-1.0025, 2B-1.0027, 2B-1.003 and 2B-1.004.

In order for an investigation to be initiated, a sworn complaint must be filed with the FEC within two years of the alleged violation.<sup>1</sup>

## **MEETINGS**

The FEC generally meets once per quarter, but the chairman or a majority of the members can call a meeting at any time, when necessary. The presence of five members is required to constitute a quorum, and the affirmative vote of the majority of the members present is required for any action or recommendation by the FEC. The Commission may meet in any city of the state, and often meets twice in Tallahassee during any given year.

## **PERSONNEL**

The Commission is established as a separate budget entity within the Department of Legal Affairs. It is not subject to the control, supervision, or direction of the Department of Legal Affairs or the Attorney General in the performance of its duties. The Commission appoints an executive director whose salary is set by the commission. The executive director employs the staff that is necessary to adequately perform the functions of the Commission.

The Commission's staff consists of the executive director, two attorneys, seven investigators, the Commission clerk, a business manager and an administrative assistant. All staff except the executive director are hired by the director.

## **RECENT CHANGES TO FEC – RELATED STATUTES**

In 2004, a number of provisions relating to candidate activities and proceedings before the FEC were amended.<sup>2</sup> Four of the changes include:

- The execution and filing of the “Statement of Candidate” in s. 106.023, F.S., no longer, in and of itself, creates a presumption that a candidate has willfully violated chapter 104 or chapter 106, F.S.; The Statement of Candidate provides that a candidate has received, read and understands the requirements of chapter 106. Prior to the change, the FEC would often use the signing of such statements to create a presumption that a person had violated chapter 106.
- Campaign reports received by the filing officer within five days of the designated due date shall be deemed timely filed *unless* the postmark indicates that a report was mailed after the due date;
- Commission investigations must now be limited only to the alleged violations specifically contained within a sworn complaint. See 106.25(2), F.S. Prior to this change, according to some practitioners, FEC investigators would often use the filing of a complaint to launch an investigation into a candidate’s entire campaign, often uncovering potential violations of provisions that were not alleged or even referenced in the complaint. In a case that originated

---

<sup>1</sup> s. 106.28, F.S.

---

<sup>2</sup> CS/SB 2346 (ch. 2004-252, Laws of Fla.)

in 2004<sup>3</sup> against a local county commission candidate, the FEC investigator found in his report (p.3):

During my investigation of the allegations contained in the sworn complaint, I found it appears that Respondent certified to the correctness of a campaign treasurer report that was incorrect, false or incomplete. *However, because this violation was not alleged in the complaint, I did not investigate this information.*

(Emphasis added.)<sup>4</sup> The FEC charged the respondent with two counts of violating section 106.07(5), F.S., even though they were never included in the complaint. Respondent was fined \$500 for each of the two counts, in addition to being fined \$1,000 for violating the statutory provisions cited in the complaint.

### **STRUCTURE OF THE COMMISSION ON ETHICS AND THE FEC**

The FEC and Commission on Ethics are similar in that both are watch dogs of the integrity of public officials - the FEC monitors candidates and the Commission on Ethics monitors elected officials. Please refer to Appendix A for a chart comparing the two agencies.

<sup>3</sup> *Florida Elections Commission v. Fernandez*; FEC 04-329; August 26, 2005.

<sup>4</sup> Section 106.07(5), F.S., prohibits a candidate from certifying to the correctness of a campaign treasurer's report that it is incorrect, false, or incomplete.

## **FEC CASELOAD**

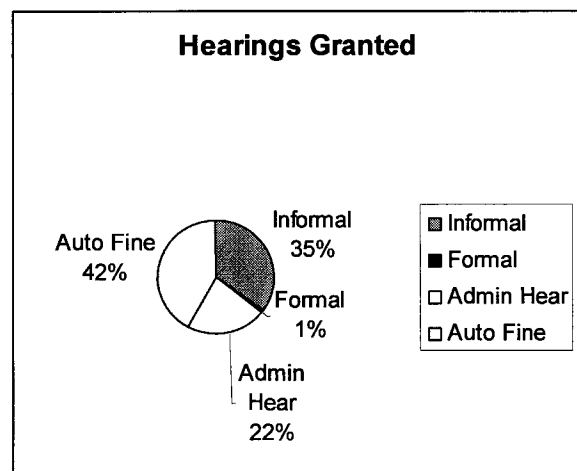
### **How are Cases Initiated?**

The FEC can only investigate a violation after receiving a sworn complaint or information reported by the Division of Elections. They are also required to only investigate those violations alleged specifically contained within the sworn complaint.

The FEC is prohibited under section 106.25, F.S., from investigating an activity or omission not found in the original sworn complaint but discovered during the course of an investigation. This is a recent change referenced earlier.

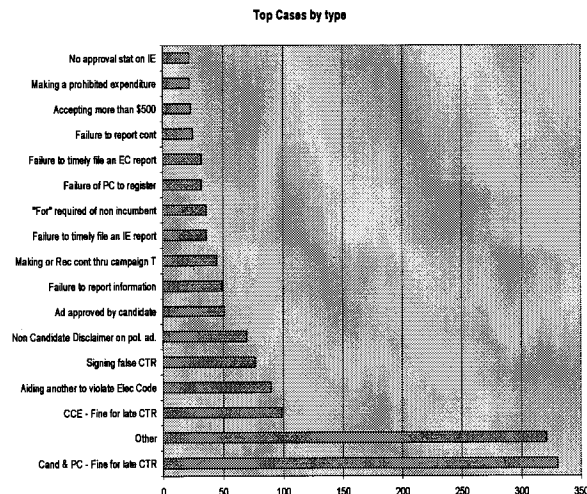
### **How are Cases Processed?**

From 2002 to August 25, 2005, four types of hearings were utilized for FEC hearings. Automatic fine hearings (42%), informal hearings (35%), formal hearings (1%) and cases referred to the Division of Administrative Hearings (22%).



## Types of Cases

There were a total of 85 currently valid sections of the statutes violated between 2002 and August 25, 2005, that have resulted in final orders. The following chart summarizes the statutes that are most commonly violated.



## Cases Filed Since 2002

The chart found at Appendix B is arranged by the statutes most violated to those least violated (when a Final Order has been published). A short description is given of the statute, the number of cases where a statute was implicated, the number of cases that resulted in fines, the total amount of money fined in these cases for all violations, the number of persons that have paid fines, the amount of money actually collected, the average days a case was open and the maximum days a case was open.

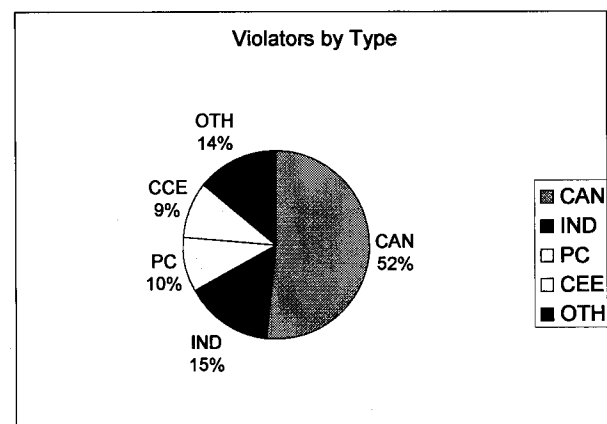
There have been 1384 cases filed and not sealed to public disclosure between January 1, 2002, and August 25, 2005. In 2002, there were 477 cases filed. In 2003, there were 285 cases filed. In 2004, there were 447 cases filed. In 2005, up through August 25,

there were 175 cases filed. Of these cases, 962 resulted in final orders.

As one can see, the FEC's caseload is cyclical, rising during election years (2002, 2004) and falling in off years (2003, 2005).

The majority of violations were committed by the following groups, as indicated in the chart below:

Candidates (CAN)  
 Individuals (IND)  
 Political Committees (PC)  
 Committees of Continuing Existence (CCE)  
 Other (OTH).



## The Element of Willfulness

For purposes of FEC jurisdiction, there must be a *willful* violation of a provision of chapters 104 or 106, F.S. Section 106.37, F.S., defines a "willful" violation. It reads:

A person willfully violates a provision of this chapter<sup>5</sup> if the

<sup>5</sup> Arguably, there is no definition of "willful" for purposes of chapter 104. This definition clearly applies to provisions of chapter 106, Fla. Statutes.

person commits an act while knowing that, or showing reckless disregard for whether, the act is prohibited under this chapter, or does not commit an act while knowing that, or showing reckless disregard for whether, the act is required under this chapter. A person knows that an act is prohibited or required if the person is aware of the provision of this chapter which prohibits or requires the act, understands the meaning of that provision, and performs the act that is prohibited or fails to perform the act that is required. A person shows reckless disregard for whether an act is prohibited or required under this chapter if the person wholly disregards the law without making any reasonable effort to determine whether the act would constitute a violation of this chapter.

There has been some disagreement between the FEC and some practitioners regarding the proper treatment of “willfulness” in a case. The issue arose in two FEC cases in particular. In *McGann v. Florida Elections Commission*<sup>6</sup>, appellant McGann appealed a final order of the FEC fining McGann \$9,600 for violations of chapter 106, F.S. In its final order, the FEC characterized the administrative law judge’s findings of fact as conclusions of law. In administrative law jurisprudence, this is significant because an agency may only reject or modify a fact finder’s conclusions of law (and not findings of fact). See 120.57(1)(l), F.S. The court reprimanded the FEC for its re-characterization of the findings of fact:

---

However, s. 106.25(3), F.S., refers to the willful violations of both chapter 104 and 106.

<sup>6</sup> 803 So. 2d 763 (Fla. 1<sup>st</sup> DCA, 2001)

Willfulness is a question of fact. See *Crawley v. Dep’t of Highway Safety and Motor Vehicles*, 616 So. 2d 1061, 1063. (Fla. 1<sup>st</sup> DCA 1993). A reviewing agency like the Florida Elections Commission cannot evade statutory restrictions on its ability to reject and ALJ’s findings of fact by denominating such findings conclusions of law. See s. 120.57(1)(l), Fla. Stat.; ....*Kinney v. Dep’t of State*, 501 So. 2d 129, 132 (Fla. 5<sup>th</sup> DCA 1987) (“Erroneously labeling what is essentially a factual determination a ‘conclusion of law,’ whether by the hearing officer or the agency does not make it so, and the obligation of the agency to honor the hearing officer’s findings of fact may not be avoided by categorizing a contrary finding as a ‘conclusion of law.’ ”)

A similar issue arose in a case that is pending before the First District Court of Appeal. In *Fugate v. Florida Elections Commission*<sup>7</sup>, the appellant was alleged to have willfully violated s. 104.31(1)(a), F.S.<sup>8</sup> The administrative law judge entered a recommended order finding that Mr. Fugate did not willfully violate section 104.31, F.S., but the FEC in its final order concluded instead that the appellant acted willfully and found a violation of the section. In his appellate brief, the appellant cites to the FEC’s final order for support that the FEC has taken findings of fact and treated them as conclusions of law:

---

<sup>7</sup> Fla. 1<sup>st</sup> DCA, 2005; Case No. 1D05-2916; FEC Case No. 03-242.

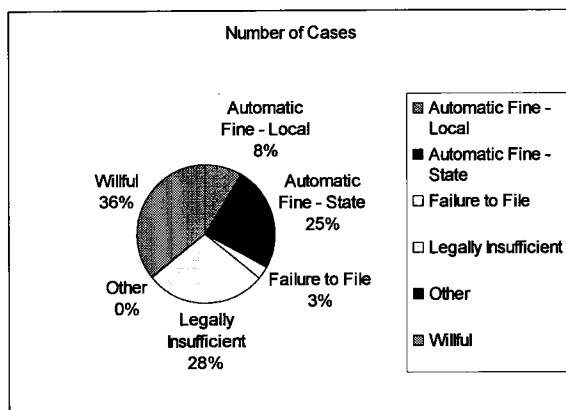
<sup>8</sup> Section 104.31(1)(a), F.S., prohibits using one’s “official authority or influence to for the purpose of interfering with an election or a nomination of office or coercing or influencing another person’s vote or affecting the result thereof.”

...the Commission concludes  
 ‘Based upon the foregoing,  
applying the facts of this case to the  
 proper legal standard of willfulness  
 in Commission proceedings, the  
 Commission finds the respondent  
 committed one count of violating  
 104.31(1)(a), Florida Statutes, the  
 Commission violated the cardinal  
 rule of administrative proceedings,  
 making itself the finder of fact and  
 applying those facts to the  
 applicable legal standard, a role  
 properly left for the judge.  
 (emphasis supplied)

The *Fugate* appeal has not been decided as of the time of this report. The FEC fined the appellant only \$500 for the violation, making an appeal cost prohibitive for most candidates.

### Late-Filed Campaign Reports

Between 2002 and August 25, 2005, there have been 1,384 cases filed. Automatic fines are generated from late-filed campaign reports. s. 106.07, F.S. These cases can be broken down in to the following categories:



### Minor Violations

The Commission has created the concept of minor violations in Rule 1B-2.003, Florida Administrative Code, for technical violations of the Election Code. This allows the respondent to dispense with a case, pay a small fine, while also neither admitting nor denying the allegations.

The FEC treats an act or omission a minor violation under the following circumstances:

- (a) The violation is one of those identified in Rule 1B-2.003.
- (b) The complaint alleging the violation contains no legally sufficient violation other than one r more of the minor violations listed in the rule.
- (c) The respondent against whom the complaint was filed has not been notified of an allegation of the same violation before the conduct about which the complaint was filed.
- (d) The respondent against whom the complaint was filed agrees to correct, if feasible, the conduct that resulted in a violation identified in this rule; and
- (e) If the violation involves political advertising, the violation must have occurred more than 14 days before the election in which the candidate or committee named in the political advertising is participating and the person, candidate, or committee that paid for the political advertisement must be named in the political advertisement. If the violation occurred less than 14 days before

the election, the complaint must not contain an allegation that the political advertising was either deceptive or influenced the outcome of the election

The following is a list of some of the more commonly cited minor violations and the number of times violated from 2002-2005:

Failure of a candidate or a person on behalf of a candidate to state on the candidate's political advertisement that the content of the advertisement was approved by the candidate and to identify the person who paid for the advertisement. *s. 106.143(4)(a), F.S.* A fine of \$250 shall be imposed for each violation.  
*79 violations.*

Prohibiting a candidate who is not the incumbent from using the word "re-elect" in his or her a political advertisement. *s. 106.143(5), F.S.* A fine of \$200 shall be imposed for each violation.  
*53 violations.*

Prohibiting a person from accepting a contribution in excess of the limits prescribed by Section 106.08, Florida Statutes, if the excessive contribution is returned to the donor within 14 days of receipt. *s. 106.19(1)(a), F.S.* A fine of \$200 shall be imposed for each violation.  
*47 violations.*

Failure of a person making an independent expenditure for a political advertisement submitted to the news media for distribution to state on the advertisement that no candidate approved the advertisement. *s. 106.143(4)(b), F.S.*

A fine of \$200 shall be imposed for each violation.  
*32 violations.*

Prohibiting a candidate or any person on behalf of a candidate from representing in a political advertisement that a person or an organization supports the candidate before obtaining the written approval of that person or organization. *s. 106.143(3), F.S.* A fine of \$200 shall be imposed for each violation.  
*31 violations.*

Failure of a candidate running for a partisan office to mark his or her political advertisement with his or her political party affiliation or to indicate that he or she is running with no party affiliation. *s. 106.143(2), F.S.* A fine of \$200 shall be imposed for each violation.  
*27 violations.*

Failure of a person making an independent expenditure for a political advertisement to mark prominently the political advertisement with the required disclaimer. *s. 106.071(2), F.S.* A fine of \$250 shall be imposed for each violation.  
*16 violations.*

Once the executive director determines that an alleged violation is a minor violation as defined by the rule, the executive director offers the respondent an opportunity to enter into a consent order to pay the applicable fine or fines designated in the rule. The consent order shall provide that the respondent neither admits nor denies the allegations.

## **POSSIBLE CHANGES TO STRUCTURE AND PRACTICE OF THE FEC**

One change to the FEC would be to better decentralize the control of the process. Currently a lot of control is exercised by the executive director. More checks and balances may be needed in the system to better serve Florida voters. Some power may need to be shifted to give more control to the commissioners that represent both the majority and minority party.

### **Place FEC Prosecutors and Attorneys under the Attorney General's Office**

This would be modeled after the COE's current structure. This action would have the benefit of putting some checks and balances into the oversight of our elections system. This would better track our judicial system in that it would give one office the duty of investigating violations and a different office would have to agree with the conclusions of the investigators and then prosecute the cases before the commission and in the court system. By doing this, we would add an additional cabinet office with a stake in ensuring that Florida had the fairest elections possible.

### **Combine the FEC and the Commission on Ethics**

In meetings with the executive directors of the FEC and the COE, the possibility of combining the two commissions was discussed. It was the opinion of both the directors that it would be problematic. Both directors highlighted these concerns:

- The major problem would be the work load of the volunteer commissioners. They would have increased areas of the law to become familiar with and would have much larger case loads. They would not be able to give each case the attention it deserves. Both directors felt full time commissioners would be needed if the commissions were combined.
- Another difficulty of combining the two commissions would be deciding which branch of government the new commission would fall under. Currently the Commission on Ethics is under the Executive branch and FEC is under the legislative branch.
- Neither director felt that combining the Ethics and Elections commissions would decrease staff. The same functions would still have to be performed.
- The Ethics Commission can write opinions while the Elections Commission can not. The Department of State writes opinions that the FEC is bound by. The FEC can levy fines but the ethics Commission only has the authority to suggest fines.

### **Limit the Tenure of the Executive Director of the FEC**

Imposing a term limit for the executive director is a possible method for ensuring that the appointed commissioners have more control of the integrity of Florida elections. This could be accomplished by limiting the executive director to two terms of three years each. By making the term three years and limiting the terms to two it would stagger the term of the director and the commission members. It would also ensure that during the limited two terms of all

commissioners that they would have the opportunity to vote on extending the executive director's term once and select an executive director at least once for their commission. This would have the effect of making the executive director more responsive to the appointed commissioners and each commission leaving its influence on the process.

### **Suggestions for Reform from the FEC**

To further regulate the election process the executive director of the FEC has made a memo originally sent from the chairman of the FEC to the Vice Chair of the House Ethics and Election Committee available. This memo outlines twenty six suggestions to further address what some consider are loopholes in the Election Code. (Please see Appendix C for the memo)

### **CONCLUSION**

The current election/campaign system places a significant hurdle to the civic-minded individual who wishes to run for public office, promote a set of issues or research and endorse a group of candidates to friends and associates. One of the hardest provisions of the Election Code is section 106.023 which requires a candidate to sign a statement saying that he has received, read and understands the requirements of chapter 106. Many would agree that there are few

people who can sign such a statement and not violate a provision of the Election Code that they do not fully understand.

The Chair of the FEC, Ms. Chance Irvine, has stated, "The Campaign Finance laws need to be rewritten. The average person running for office cannot read Chapters 104 and 106, Florida Statutes, and understand what the laws require of him or her. Therefore, we suggest that the Legislature form and fund a special commission to rewrite the chapters. In addition, we have the following specific suggestions. These suggestions, however, will not fix the bigger problem that the campaign financing laws are incomprehensive to most candidates."

The Legislature and Department of State have arguably attempted to address the challenges that may be encountered by the novice candidate by requiring that a violation must be willful. They have also attempted to limit violations of the Election Code to those that have actually been reported to the FEC in a sworn complaint. Few can argue that a re-write of portions of the Election Code, particularly chapter 106, is a wise idea.

*Prepared by Bob West.*

## **Appendix A**

# FEC Cases 2004 - 2005

Statute	Description	Number cases	Fines	Total	Paid	Collected	Avg Open	Max Open
106.07(8)(b)	Cand & PC - Fine for late CTR	330	269	\$271,943	125	\$155,802	99	443
106.04(8)(b)	CCE - Fine for late CTR	99	86	\$77,038	84	\$76,950	91	246
104.091	Aiding another to violate Election Code	90	0	\$0	0	\$0	264	301
106.07(5)-2	Signing false CTR	77	49	\$313,561	39	\$137,358	306	884
106.143(1)	Non Candidate Disclaimer on pol. ad.	70	53	\$79,475	51	\$76,475	176	532
106.143(4)(a)-2	Ad approved by candidate	51	40	\$78,225	39	\$77,225	193	532
106.19(1)(c)	Failure to report information	49	26	\$224,600	19	\$117,500	305	884
106.021(3)-1	Making or Rec cont thru campaign	45	2	\$42,000	1	\$7,000	283	884
106.071(1)-1	Failure to timely file an IE report	36	13	\$39,950	9	\$22,400	222	449
106.143(5)-2	"For" required of non incumbent	36	35	\$15,850	35	\$15,850	106	346
106.03(1)	Failure of PC to register	32	9	\$30,800	7	\$18,700	242	493
106.071(1)-2	Failure to timely file an EC report	32	15	\$44,950	12	\$30,400	227	540
106.19(1)(b)	Failure to report cont	25	16	\$145,874	13	\$77,490	348	884
106.19(1)(a)	Accepting more than \$500	23	11	\$134,860	9	\$80,560	297	768
106.19(1)(d)	Making a prohibited expenditure	22	18	\$153,303	12	\$56,400	422	884
106.143(4)(b)-2	No approval stat on IE	22	9	\$25,150	8	\$13,150	226	540
106.143(2)	PP required on disclaimer	18	11	\$14,110	10	\$13,110	157	464
106.07(1)	Cand & PC - FF reports	18	16	\$8,575	12	\$4,575	296	583
104.31(1)(a)	Using authority to influence elections	18	6	\$16,140	5	\$15,640	337	550
106.09(1)	Accepting cash cont \$100+	17	12	\$60,200	9	\$22,200	373	884
106.11(4)-3	Incurring expenses w/out funds	16	12	\$105,369	9	\$43,350	371	884
106.143(3)	Written proof of support	14	8	\$12,000	6	\$7,100	278	470
104.011(1)	False swearing of an oath	13	0	\$0	0	\$0	189	252
106.15(3)	Using service of state emp	10	3	\$11,640	2	\$11,140	252	450
106.071(2)	Failure to include IE disclaimer	9	6	\$4,250	5	\$1,250	142	220
106.141(1)-2	Failure to file Term report	9	8	\$4,725	4	\$1,225	365	584
106.08(1)	Making excessive contribution	8	3	\$8,900	3	\$8,900	244	301
106.1435(3)	Prohibit sign on rt-of-way	8	8	\$5,350	8	\$5,350	131	403
106.29(3)(b)	PP - Fine for late CTR	8	8	\$5,937	6	\$5,087	144	329

FEC Cases 2004 - 2005								
Statute	Description	Number cases	Fines	Total	Paid	Collected	Avg Open	Max Open
106.021(3)-2	Making exp except thru T	7	7	\$57,150	6	\$12,850	356	493
106.025(1)(b)	Failure to account for \$	6	2	\$5,160	2	\$5,160	203	368
106.07(5)-1	Failure to sign CTR	6	4	\$8,300	4	\$8,300	321	470
106.07(2)(b)	Failure to file addendum	6	4	\$3,500	3	\$2,500	265	319
106.025(1)(c)	Bad disclaimer on PA for fund raiser	6	4	\$6,500	4	\$6,500	134	268
106.143(4)(a)-1	Obtain candidate approval	6	1	\$200	1	\$200	221	239
106.08(3)(a)	Failure to C w opp to return late contribution	6	4	\$26,134	3	\$2,050	291	487
104.31(1)(b)	Coercing campaign contributions	6	2	\$3,000	2	\$3,000	319	550
106.11(1)-1	Failure of T to use check	5	5	\$59,867	3	\$25,783	454	768
106.143(4)(b)-1	No approval stat to news media	5	2	\$4,250	1	\$1,800	226	449
106.08(6)	Failure of PP to return earmarked contribution	5	1	\$3,000	1	\$3,000	313	417
106.143(1)(a)	Candidate Disclaimer on pol. ad.	5	5	\$1,300	5	\$1,300	66	108
106.141(1)-1	Properly disposing of camp funds	5	5	\$35,834	3	\$1,750	392	487
106.12(3)	Spending over \$30 in petty cash	5	5	\$30,684	3	\$5,800	452	748
104.071(1)(c)	Further another's candidacy	4	2	\$7,900	2	\$7,900	253	305
106.04(4)(b)	CCE - FF reports	4	4	\$3,200	1	\$200	308	362
106.055	Failure to FMV in-kind contribution	4	1	\$1,500	1	\$1,500	167	277
106.11(5)	Using funds for unlisted purposes	4	3	\$12,900	2	\$2,900	318	395
106.08(4)	Using late contribution	3	1	\$500	1	\$500	241	289
106.15(4)	Accepting cont in gov bldg	3	1	\$1,000	1	\$1,000	222	259
104.011(2)	Submitting false information	3	0	\$0	0	\$0	190	231
106.05	Failure of T to deposit fund in 5 days	3	2	\$7,500	2	\$7,500	317	540
106.147(1)(a)	Disclaimer on phone solicitation	3	2	\$1,500	2	\$1,500	334	652
106.12(2)	Excessive petty cash - aft Q	2	2	\$26,084	1	\$2,000	396	487
106.023	File St of Candidate	2	1	\$2,500	1	\$2,500	219	345
106.147(2)-1	Requires C approval	2	0	\$0	0	\$0	334	570
106.08(5)(a)	Making cont thru or in name of another	2	2	\$175,400	1	\$131,100	356	467

# FEC Cases 2004 - 2005

Statute	Description	Number cases	Fines	Total	Paid	Collected	Avg Open	Max Open
106.1437	No disclaimer on public policy stat	2	1	\$200	1	\$200	104	109
106.29(2)-2	Signing false CTR	2	1	\$4,000	1	\$4,000	296	403
106.141(8)-1	Timely filing office account reports	2	2	\$1,100	2	\$1,100	373	389
104.071(1)(a)	Promise to appoint another	2	1	\$38,500	1	\$38,500	294	458
106.1405	Using funds for living exp	2	2	\$47,084	0	\$0	487	487
104.051(2)	Official neglects duty	2	1	\$200	1	\$200	116	140
106.08(3)(b)	Failure of C w/out opp to return cont	2	1	\$7,000	1	\$7,000	314	400
106.11(4)-2	Signing check w/out funds	2	1	\$6,000	1	\$6,000	283	317
104.071(1)(d)	Giving value for prohibited act	1	0	\$0	0	\$0	203	203
106.021(1)(a)-2	Accept cont before open acct	1	0	\$0	0	\$0	112	112
106.11(4)-1	Auth expense w/out funds	1	1	\$2,200	1	\$2,200	748	748
104.15	Voting by unqualified elector	1	0	\$0	0	\$0	108	108
104.0515(2)(b)	Denying right to vote	1	1	\$200	1	\$200	91	91
106.29(1)	Failure of PP to file CTR	1	1	\$1,000	0	\$0	477	477
104.045(2)	Accepting benefit for a vote	1	0	\$0	0	\$0	357	357
106.25(7)	R revealing confidential comp	1	1	\$1,000	1	\$1,000	281	281
106.021(1)(b)-1	Using other than the primary camp deposit	1	1	\$2,500	1	\$2,500	345	345
106.147(2)-2	Filing C's approval	1	1	\$500	1	\$500	652	652
106.11(1)-3	Use camp acct for other than camp	1	1	\$1,000	1	\$1,000	402	402
106.11(4)-4	Failure to pay upon delivery	1	0	\$0	0	\$0	317	317
106.143(4)(a)-3	Authorization to news media	1	1	\$400	1	\$400	242	242
106.141(5)-2	Spending office account funds	1	1	\$400	1	\$400	389	389
106.07(8)(d)	Failure to notify FEC of late filing	1	1	\$3,650	1	\$3,650	142	142
106.141(1)-3	Accepting late contribution	1	0	\$0	0	\$0	367	367
106.08(5)(c)	Making cont to charitable org for support	1	1	\$2,200	1	\$2,200	748	748
106.125-2	Improper use of credit cards	1	1	\$850	1	\$850	429	429
106.08(2)(a)-2	Limitation on when accept cont PP	1	1	\$500	1	\$500	331	331
106.08(5)(b)	Soliciting cont from charitable org	1	1	\$2,000	0	\$0	317	317
106.147(1)(c)	False claim you rep org	1	0	\$0	0	\$0	570	570

## Appendix B

	<b>Commission on Ethics</b>	<b>Florida Elections Commission</b>
<b>Commissioners</b>		
<b>Number of commissioners</b>	Nine	Nine
<b>Term length of commissioners</b>	Commissioners serve two year terms. No member may hold any public employment or serve more than two full terms in succession.	The chair of the Commission serves for a maximum of four years with his or her term running concurrently with the term of the appointing Governor. The members of the Commission may serve no more than two full terms of four years.
<b>How commissioners are appointed</b>	Five members are appointed by the Governor, with no more than three from the same political party. One member appointed by the Governor must be a former city or county official. Two members are appointed by the President of the Senate and two members by the Speaker of the House of Representatives. Neither the President nor the Speaker may appoint more than one member from the same political party. No member may hold any public employment or serve more than two full terms in succession.	The Commission is composed of nine members appointed by the Governor. The Governor appoints the chair on his own and the other members from lists of three names provided to him by the President of the Senate, the Speaker of the House of Representatives, and the minority leaders of both houses.
<b>Staff</b>		
<b>How many staff</b>	Twenty employees in Tallahassee. The Legal Section drafts legal opinions, orders, rules, and proposed legislation for consideration by the Commission, represents the Commission in litigation, and responds to inquiries about the ethics laws. The Public Information Section provides information regarding Commission practices and procedures to other states, the press, and the public, and responds to inquiries about the Commission and the ethics laws. The Investigative Section investigates complaints of violations of the ethics laws and writes narrative investigative reports. The Financial Disclosure Section handles and supervises the disclosure notification process, receives and maintains disclosure forms, enforces the timely filing of disclosure forms, and responds to inquiries about financial disclosure laws. The Administrative Section provides administrative and clerical support to Commissioners and staff.	The Commission appoints an executive director who shall employ such staff as are necessary to adequately perform the functions of the Commission. The Commission staff consists of the executive director, two attorneys, seven investigators, the Commission clerk, a business manager and an administrative assistant (13 total).

	<b>Commission on Ethics</b>	<b>Florida Elections Commission</b>
<b>Jurisdiction</b>		
<b>Chapters in Statutes</b>	The Commission is created by Sections 112.320 and 112.321, Florida Statutes, and is governed by Article II, Section 8(f) and (h), Florida Constitution, which authorizes it to investigate complaints alleging breaches of the public trust by public officers and employees. ss. 11.062, 112.317, 112.322, 112.324, 112.3144, 112.3145, 112.3147, 112.3151, 112.3144, 112.3145, 112.3148, 112.3149, 112.3173, 112.3175, 112.3215, 287.175, 350.041, 350.042, 350.043, F.S.	Violations of Chapters 104 and 106, Florida Statutes. Appeals of automatic fines pursuant to Sections 106.04(8), 106.07(8), and 106.29(3), Florida Statutes. Appeal of dissolution or decertification of committees pursuant to Sections 106.03(7), and 106.04(7), Florida Statutes. Appeals of adverse decisions on public financing distributions pursuant to Section 106.35(1), Florida Statutes. Appeals of fines by members of county canvassing boards pursuant to Section 102.112, Florida Statutes.
<b>General</b>		
<b>Established</b>	1974	1973
<b>When do they meet</b>	Commission meets every six weeks	Commission meets four times a year.
<b>Who prosecutes cases</b>	Commission staff attorneys and advocates. (usually advocates)	Three attorneys present cases to commissioners and they vote.
<b>Authority to issue opinions</b>	The Commission renders legally binding advisory opinions interpreting the ethics laws and implements the State's financial disclosure laws.	No. Under certain circumstances the Department of State's Division of Elections may issue opinions.

## **Appendix C**

## MEMORANDUM

**TO:** Representative Jennifer Carroll, Vice-Chair, House Ethics and Elections Committee  
**FROM:** Chance Irvine, Chair, Florida Elections Commission  
**DATE:** October 7, 2005  
**SUBJECT:** Recommended changes to The Florida Election Code.

---

The Campaign Finance laws need to be rewritten. The average person running for office cannot read Chapters 104 and 106, Florida Statutes, and understand what the laws require of him or her. Therefore, we suggest that the Legislature form and fund a special commission to rewrite the chapters. In addition, we have the following specific suggestions. These suggestions, however, will not fix the bigger problem that the campaign financing laws are incomprehensive to most candidates.

1. §98.015, Florida Statutes -- Amend the section to require supervisors of elections who have information of violations of The Florida Election Code to notify the Florida Elections Commission (FEC). The participation of filing officers is needed to enforce the election code in a fair and consistent manner.

2. §100.3605, Florida Statutes -- Section prohibits municipalities from adopting a charter or ordinance that conflicts with a provision of The Florida Election Code. Amend the section to provide that the FEC enforces the section.

3. §106.011(1)(a)3, Florida Statutes -- Section provides that an electioneering communications organization (ECO) is an exception to political committees (PC) and requires them to file and report. Establish a new section outside the definition section that provides how an ECO must register and report, possibly incorporating ECOs into §106.03, Florida Statutes. As the statute is now written, the FEC must charge an ECO that does not register or report correctly with violating a section in the definitions.

4. §106.011(3)(d), Florida Statutes -- Amend the definition of contribution to exclude editorial endorsements only by recognized news media. The change would reverse *Pasquale v. Florida Elections Commission*, 759 So.2d 23 (4<sup>th</sup> DCA 2000). In *Pasquale*, a number of citizens, including the Pasquales and a Mr. Carroll, formed a discussion group about city government. Mr. Carroll then began printing what he called a newsletter about city government. He paid all the costs of producing the newsletter, and he and others distributed the newsletter to the public by placing copies in plastic bags and leaving them on the lawns of homeowners. The newsletter was published irregularly for approximately one year when Mr. Carroll wrote an article supporting Ms. Pasquale who ran in the 1996 city elections.

The FEC found the newsletter was a political advertisement and a contribution to Ms. Pasquale's campaign. The court reversed and held the newsletter was not an in-kind contribution to the Pasquale campaign because it was an exempt editorial endorsement. The change would exempt only editorial endorsements in recognized news media and not allow an exemption for an informal newsletter that in fact was a political advertisement.

5. §106.011(13), Florida Statutes -- Add "direct mail" to the definition of "communications media." Presently a person, including a corporation, can spend unlimited funds on printing and mailing an electioneering communication without

including the disclaimer (§106.1439) as long as it is done in-house, because electioneering communication is defined as a "paid expression in any communication media."

6. §106.011(18)(c) & (d), Florida Statutes -- Repeal these sections. Candidates are using ECO as alternatives to raising money in their own campaigns, which are limited to \$500 per contributor per election. A candidate can help an ECOs raise unlimited funds in unlimited quantities and then work with the ECO to publish ads supporting themselves or attacking their opponents as long as the ads don not use the Buckley magic words like "Vote for," or "Vote Against," etc. Federal law does not allow coordination.

7. §106.011(5), Florida Statutes -- For the same reasons explained in ¶6, amend the definition of independent expenditure to assure that the candidate and the ECO operate independently. Provide that if the candidate coordinates with the ECO, she must report the value of the ad published by the ECO as an in-kind contribution or limit contributions to ECOs to \$500.

8. §106.011(19), Florida Statutes -- Add a definition for express advocacy. Otherwise, we are left with the definition of express advocacy in DE 05-06. Express advocacy could be defined as any ad that names a candidate and is published within 60 days of an election, so that it would incorporate the Buckley definition of express advocacy, plus the functional equivalent of express advocacy, which McConnell allows the state to regulate. The clear purpose of mentioning a candidate in an ad is to convince the public to approve or reject that candidate at the polls. Ads published more than 60 or so days (I am not sure of the outside limit.) before the election that does not contain the magic words or their equivalent would be included in the definition of "electioneering communication."

9. §106.??, Florida Statutes -- Add a section that would provide accountability of ECOs and PCs. These groups by planning ahead can, for example, register a week before the election, raise hundreds of thousands of dollars in the next few days, publish its attack ad a day or two before the election, mail its report to be received after the election, and dissolve the same day. One suggestion is to require ECOs and PCs to file a statement with the filing officer within 24 hours of publishing an ad, as required by federal election law. Perhaps the filing officer should then be required to notify that candidate about the filing. Another suggestion is to require an ECO and PC to maintain its registered agent and not be allowed to dissolve until 90 days after the election in which it participated.

10. §106.011(8), Florida Statutes -- Amend the section to clarify whether an ECO is a person and what other provisions of Chapter 106 apply to ECOs.

11. §106.021, Florida Statutes -- Amend the section to provide that a candidate may not be the treasurer or deputy treasurer of his or her campaign, if the campaign accepts contributions or makes expenditures in excess of \$10,000. The most egregious violations of The Florida Election Code have occurred when the candidate serves as his campaign's treasurer or deputy treasurer.

12. §106.023, Florida Statutes -- Add to the Statement of Candidate form, which candidates are required to sign before running for office, a statement that the candidate does not owe any fines to the Florida Elections Commission or his or her filing

officer.

13. §106.04(4), Florida Statutes -- Add a provision that requires a committee of continuous existence (CCE), within 10 days of the change, to inform the DOE when there are changes in the criteria that are necessary to qualify as a CCE. The purpose of the change is to assure that the CCEs continue to meet the qualifying requirements and report their officers and address changes. This is presently required of PCs.

14. §106.055, Florida Statutes -- Amend the section to require a candidate who does not receive the value of an in-kind contribution from the contributor before the candidate's report is due to estimate the fair market value of goods or services he received.

Also, amend the section to specify how to value an in-kind contribution of transportation. The Code of Ethics for Public Officers and Employees may provide a model. §112.3148(7)(d), provides that transportation in a private conveyance is valued the same as transportation in a comparable commercial carrier. At present The Florida Election Code does not specifically address the issue and candidates are confused about this issue.

15. §106.06, Florida Statutes -- Amend the section to require a treasurer to deliver all campaign records to the candidate within 30 days of the candidate filing his termination report. It is then the responsibility of the candidate to keep the records for the number of years equal to the term of office. As enhanced fine should be provided if the treasurer fails to deliver timely the records to the candidate. The purpose of this change is to protect the candidate from the negligence of a treasurer who fails to maintain the records, as current law requires.

16. §106.07(1), Florida Statutes -- Amend the section to provide that the candidate, rather than the treasurer, is responsible for filing regular campaign reports. Candidates are more knowledgeable than treasurers concerning when to file campaign reports and, if a report is late, it is the candidate, not the treasurer, who must pay the fine.

Also amend section to require that receipts must be maintained for all reimbursed expenses and for all petty cash expenditures. The purpose of this change is to protect the candidate from the negligence of a treasurer who fails to maintain the records, as current law requires.

17. §106.071(3), Florida Statutes -- Amend the section to provide for an enhanced penalty if a person includes a false disclaimer on a political ad, which is more egregious than if a person includes a disclaimer that may not be exactly correct.

18. §106.09, Florida Statutes -- Amend the section to provide that the \$100 cash contribution limit is \$100 per contributor, per election. The change is necessary because candidates are accepting a series of \$100 cash contribution from the same contributor, thus nullifying the \$100 limitation.

Also, amend the section to prohibit a person from making and a candidate from accepting a contribution by means of a money order in excess of \$100. Money orders, like cash, are difficult to trace.

19. §106.11, Florida Statutes -- Amend the section to provide that campaign funds can only be used to influence an election, which seems obvious, but is not presently stated in The Florida Election Code.

Also, amend the section to provide that candidates may expend excess campaign

funds for items obligated before he or she withdrew, became unopposed, or was eliminated or elected only if the obligation was for the purpose of influencing the election and was in writing. Also provide that a candidate may purchase mementos only of nominal value expressing gratitude to campaign supporters. These changes assure that campaign contributions are used for campaigning.

20. §106.1405, Florida Statutes -- Amend this section to provide that if a member of a candidate's family provides goods or services to the candidate, the family member can be paid no more than the fair market value of the goods and services. The Commission has had several cases of candidates paying family members more than fair market value for services to their campaign.

Also, amend the section to prohibit a candidate from paying a fine for violating the election code out of his campaign funds or his office account and to require that such fines be paid from the personal funds of the candidate.

21. §106.141, Florida Statutes -- Amend this section to eliminate the provision that a candidate can be reimbursed by the campaign for loans she made to her campaign. However, the candidate may receive a pro rata share, if leftover funds are returned to other contributors.

Also, amend the section to require all candidates to keep receipts for all office account expenditures. The Commission, the filing officer, and the employing agency may inspect the receipts.

22. §106.143(1)(a), Florida Statutes -- Amend the section to clarify that all ads paid for by a candidate must include a disclaimer. The 2004 legislation removed the term "campaign literature" from the section, which now requires that only a "political advertisement" needs a disclaimer. An ad is a "political advertisement" only if it contains express advocacy.

Therefore, a candidate, for example, could draft an attack ad against her opponent on her home computer, take the ad to Kinkos, make 1000 copies on Kinkos' duplication machine, and pay with campaign funds. The candidate could then buy 1000 stamps at the USPO, again with campaign funds, and with her campaign workers, stamp and mail the 1000 copies. That ad does not require a disclaimer (or could contain a false disclaimer) as long as it does not use the Buckley magic words of "Vote for," or "Vote Against," etc.

23. §106.19(2), Florida Statutes -- Amend section to provide that if a person willfully violates Sections 106.19(1)(a), (b), or (d), the Commission shall assess a civil penalty of up to three times, rather than three times, the amount involved in the violation. This change gives the Commission more flexibility on the amount of the fine.

24. §106.22, Florida Statutes -- Amend the section to provide that the DOE conduct random audits immediately following the general election of at least 10% of all candidates, PCs, CCEs, ECOs, and political parties that file with DOE. When a candidate, committees, or political party knows that its records and reports may be audited, there will be increased compliance with the requirements of Chapter 106, which should ultimately reduce the workload of both the Commission and DOE.

Also provide that DOE must report, in writing, any violation it finds to the FEC. Participation of filing officers is needed to enforce the election code in a fair and consistent manner.

25. §106.23, Florida Statutes -- Amend this section to provide that the

Commission may issue advisory opinions on issues concerning Chapters 104 and 106. The Commission is in a position to see the problems with Chapters 104 and 106 and can address them through an opinion before candidates and committees violate the statute.

Also provide that any such person or organization, acting in good faith upon such an advisory opinion, will not be subject to any civil or criminal penalty provided for in Chapter 106. This change will encourage candidates and committees to ask for an opinion before acting.

26. §106.25, Florida Statutes -- Amend the section to require filing officers to notify the Commission when he or she has information of any violation of The Florida Election Code over which the Commission has jurisdiction. The Commission needs the participation of filing officers to enforce effectively the code. A person other than a filing officer must file a sworn complaint. When the Commission is notified by the filing officer or received a complaint, the Commission would investigate all violations of Chapters 106 and 104.

Also, change the statute of limitations from 2 years to 3 years. This change is necessary since it is recommended that DOE conduct audits on a two-year election cycle after the general election.

Also, amend the section to codify the standard of proof in all Commission matters as a preponderance of the evidence, since the actions of the Commission are remedial, not penal.